

Abolition in Our Time

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PROLOGUE

It is 2022. The death penalty in the United States remains an available punishment in a majority of states. Concerns about its reliability and fairness, however, have caused some states to abolish it legislatively, others to abolish it judicially, and still others to impose formal moratoria on the carrying out of sentences. The number of executions nationwide over the past two decades is roughly comparable to the number carried out in the three decades post-*Furman*, but a noticeable shift has occurred: federal executions for “extraordinary” crimes, such as terrorism and treason have increased, and state executions for “ordinary” crimes (e.g., murders aggravated by robbery, sexual assault, kidnapping) have declined. As in the decades following *Furman*, executions at the state level are largely confined to a few states, and many states without a formal moratorium in place nonetheless do not execute death-sentenced offenders. In addition, the public has become aware of several executions of demonstrably innocent defendants, and there are increased calls by various organizations (the American Bar Association, the NAACP Legal Defense Fund, and others) for the abolition of the death penalty.

The politics of the death penalty have also shifted. Prominent politicians in both parties are willing to oppose the death penalty publicly, though very few make it a political priority. Many such leaders also distinguish between the importance of retaining the death penalty for cases in which “vital national interests” are at stake—the war on terrorism—and cases involving ordinary state law enforcement. As a sociological matter, the “face” of the death penalty has changed. Public fear focuses less on the threats presented by the urban poor, racial minorities, and by those involved in the local drug trade, and more on non-Western, international threats to America’s national security. Internationally, opposition to the death penalty is at its peak, and the United States’ continued use of the death penalty has become a much more serious impediment to United States’ foreign policy. Several countries both within and outside of the European Union have refused to extradite to the United States key suspects in terrorist activities, and some countries have actually imposed trade barriers to United States’ exports because of its retentionist stance.

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Litigation over the death penalty has increased in the state courts, and state judges in jurisdictions where executions are infrequent or entirely absent have seemed more willing to find state law bases for curtailing certain death penalty practices. At the federal level, the United States Supreme Court has ruled that the death penalty is excessive as applied to juveniles, but has not entertained many other cases targeting the death penalty. Against this backdrop, the Court has now chosen to hear several cases presenting “global” challenges to the death penalty and calling for its judicial abolition through the Constitution. The Court’s decision follows.

J. v. Texas (2022)
K. v. Virginia (2022)
L. v. Florida (2022)
M. v. United States (2022)

CHIEF JUSTICE Appel delivered the opinion of the Court.

I.

We granted certiorari in these four cases to address the common constitutional question presented by petitioners: whether the death penalty as it is presently administered in the United States remains consistent with the Constitution. Three of the cases arise out of state court prosecutions for murder accompanied by some aggravating circumstance or its functional equivalent (*J. v. Texas* (double homicide in the course of armed robbery); *K. v. Virginia* (murder in the course of sexual assault); and *L. v. Florida* (murder for hire)). The fourth case (*M. v. United States*) involves a federal prosecution in New York under the 2006 provisions of the Homeland Anti-Terrorism Statute for the crime of conspiracy to possess and utilize a weapon of mass destruction.

The parties in this case, as well as the many amici, offer a staggering array of arguments addressing the current constitutional status of the death penalty. The sheer volume of the submissions before us reminds us of the enormous passion and extensive history surrounding the death penalty debate. Our job, of course, is to assess the constitutional status of the death penalty and not to arrive at our own judgment of its wisdom or morality.

We do not write on a clean slate. Fifty years ago, we were confronted with a similarly broad constitutional challenge to capital punishment. *Furman v. Georgia*, 408 U.S. 238 (1972). In *Furman*, we issued a terse *per curiam* decision invalidating all then-existing capital statutes under the Eighth and Fourteenth Amendments. Several of the separate opinions supporting that judgment expressed a common concern about the failure of such statutes to provide sentencers with any meaningful guidance regarding who should live or die. The lack of guidance was particularly troublesome because death sentences and especially executions had become relatively rare events as of 1972. The paucity of executions in relation to

the number of death-eligible offenders, together with the absence of legislative guidance in the sentencing process, led us to doubt whether those condemned to die were in fact the most deserving offenders. Although some of the concurring opinions expressed doubts about the constitutionality of the death penalty as a method of punishment, *Furman* is best read to condemn the penalty's arbitrary administration. We left open the possibility that more tailored death penalty schemes might satisfy constitutional requirements, and we were not prepared to conclude as of that time that the imposition of the death penalty violated prevailing national values.

The rest is familiar history. State legislatures energetically embraced the challenge to revise their statutes to comply with the direction of *Furman*. We subsequently reviewed their efforts in 1976, and we ultimately sustained the "guided discretion" approach to capital sentencing reflected in three of the state statutes we reviewed. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976). In light of the overwhelming legislative endorsement of the death penalty as an appropriate, and appropriately limited, response to crime, we were unable to conclude that those new statutes authorizing capital punishment reflected an outdated morality. We could not, as had been urged four years before, credit the claim that death penalty statutes remained on the books merely as a formal matter, having fallen into widespread desuetude. In the decades following these landmark decisions, we have refined particular aspects of our death penalty jurisprudence. Indeed, we have embraced as-applied challenges to each of the three statutes that we had upheld against facial constitutional challenge, *Godfrey v. Georgia*, 446 U.S. 420 (1980) (rejecting overly broad aggravating factor without adequate limiting construction by the state courts); *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (rejecting Florida's refusal to provide vehicle beyond statute's enumerated mitigating factors for consideration of defendant's mitigating evidence); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (finding Texas special issues inadequate as vehicle for consideration of defendant's mitigating evidence of mental retardation and history of being abused). Nonetheless, the guided discretion schemes provisionally approved in 1976 continue to provide the basic structure of contemporary capital statutes.

II.

Petitioners insist that several developments require our reconsideration of the 1976 decisions. First, petitioners assert that neither the states nor the federal government have cured the arbitrariness concerns prominent in our *Furman* decision, and that new and more comprehensive empirical evidence of arbitrary and discriminatory administration of the death penalty requires us to declare the "experiment" with guided discretion a constitutional failure. Second, petitioners insist that the possibility of error in capital cases is constitutionally intolerable, and they point to documented cases involving the execution of factually innocent

defendants to support this claim. Third, petitioners assert that the significant and increasing delays between the time of sentence and execution constitutes cruel and unusual punishment for those offenders who must languish on death row for an indeterminate and excessive period awaiting their fate. Lastly, petitioners claim that we should now recognize the development of a national consensus regarding the excessiveness of the death penalty as a criminal punishment. Our ultimate resolution of these cases requires us to address each of these contentions.

We reject the first petitioners' first three claims but conclude that the death penalty for ordinary crimes is no longer consistent with evolving standards of decency. We accordingly reverse the death sentences in the state cases and affirm the death sentence of the federal petitioner.

A.

The petitioners' claim of arbitrariness rests on voluminous submissions including professional studies, legislative "self-studies" from several states (including three "moratorium" states), and statistics regarding the implementation of the death penalty. The professional studies before us were designed by sociologists and lawyers to discern the role of various considerations in the implementation of the death penalty. Some of the professional studies purport to identify the continuing significance of race—especially the race of victims—in capital decision-making. Other professional studies purport to document the "confusion" of capital decision-makers. According to one study, the guidance in post-*Furman* statutory regimes is not only insufficient to identify the "worst" offenders but counter-productive because it tends to undermine jurors' sense of responsibility for their verdicts. The legislative self-studies from California, Maryland, and Ohio include findings of racial and geographical discrimination in death sentencing within those states. The California study, produced by a non-partisan state commission, also highlights representational disparities as a separate potential source of arbitrariness. Based on a review of trial, appellate, and post-conviction representation, the commission concluded that quality of representation is more important to ultimate outcomes (death versus non-death verdicts) than many other salient variables, including the race, sex, and age of the defendant.

Other statistical information submitted to the Court reveals that over 85% of executions in the United States occur within just seven jurisdictions (six states and the federal government). Additionally, similar crimes are treated quite differently not only across jurisdictions but also within them. Moreover, apart from *sentencing* rates, jurisdictions differ substantially in the likelihood that a sentence will be consummated with an execution, as well as in the time period from the imposition of a death sentence to its execution. In three jurisdictions (Texas, Virginia, and Oklahoma), the average time between sentence and execution over the past two decades (2002-22) has been 4.2 years (appreciably lower than the average time between sentence and execution in the three decades following *Furman*). In many other jurisdictions, especially the moratorium jurisdictions, the

time between sentence and execution is quite extended, and it is argued that in some jurisdictions there is no realistic prospect of executions in the near future.

Statistics are also presented regarding the federal death penalty. Such statistics reflect an increased rate of death sentencing at the federal level over the past three decades as well as a higher rate of executions. A substantial number of the federal executions have occurred via convictions in both civilian and military tribunals for crimes involving terrorism and treason. It is argued that the selective use of the federal death penalty power for certain crimes, while forgoing prosecutions for other ostensibly "death-eligible" federal crimes, constitutes an unacceptable discrimination and reflects racial, ethnic, and religious bias.

Appellants contend that the various academic and legislative studies as well as raw statistics regarding the operation of the death penalty within the states and the federal government establish a constitutionally intolerable level of arbitrariness in the American death penalty. They contend that the federal and state experience over the preceding five decades should be understood as an experiment to reduce arbitrariness in the administration of capital punishment and that this Court should recognize and announce its failure.

Appellees challenge the methodological foundations of the studies before us as well as petitioners' conclusions regarding the level and significance of arbitrariness in the American death penalty system. We need not resolve the essentially factual dispute about the extent of arbitrariness in the choice of the condemned because we believe appellants' constitutional arguments rest on a flawed understanding of our previous decisions. It is true that *Furman* and the 1976 decisions together recognize an Eighth Amendment interest in the fair administration of the death penalty. Properly understood, these decisions require death penalty jurisdictions to provide some standards for the implementation of the death penalty. *Gregg v. Georgia*, 428 U.S. 153 (1976). Accordingly, a state may not make the death penalty available without enumerating aggravating factors or their functional equivalent to guide sentencer discretion. *Lowenfield v. Phelps*, 484 U.S. 231 (1988). These factors should communicate the policy goals underlying the jurisdiction's use of the death penalty and thereby narrow the class of death-eligible offenders. *Zant v. Stephens*, 462 U.S. 862 (1983). To serve this function, aggravating factors must not be so vague as to potentially apply to any given case of murder. *Arave v. Creech*, 507 U.S. 463 (1993). Moreover, the state must bear the burden of establishing the existence of such factors beyond a reasonable doubt. *Ring v. Arizona*, 536 U.S. 584 (2002).

These decisions, though concerned with arbitrariness, do not authorize federal courts to police the "outputs" of state or federal capital punishment systems. We recognized in *Furman* that states had failed to develop any *procedural* safeguards concerning the implementation of the death penalty. Prevailing death penalty statutes afforded juries absolute and unreviewable discretion regarding who should live or die. We sustained the guided discretion statutes in 1976 because the statutes before us had made significant strides toward identifying in advance those cases warranting the ultimate sanction.

We have not, and do not now, recognize an Eighth Amendment right to some particular conception of "equal" outcomes in the actual administration of the death penalty. At the outset, we acknowledge the power of some of the states' concerns about the reliability of the studies purporting to show discrimination and bias. We doubt that such empirical studies—even if administered with great care and objectivity—can truly capture all relevant considerations in the death penalty decision-making process. Indeed, our expansive individualization jurisprudence rests in part on the realization that states are incapable of exhaustively listing relevant individualizing evidence; hence, we have consistently required states to permit sentencer consideration of non-statutory individualizing factors (i.e., factors neither enumerated nor effectively addressed within state schemes). *Lockett v. Ohio*, 438 U.S. 586 (1978); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Hitchcock v. Dugger*, 481 U.S. 393 (1987). The failure of such studies to account for all potentially relevant considerations precludes any definitive conclusions about the role various factors such as race or quality of representation play in the implementation of the death penalty. At the end of the day, we are simply unable to assess whether a study's finding of bias reveals a truth about the actual administration of the death penalty or instead reflects the failure of the study to consider the impact of some undiscovered, yet highly explanatory, variable.

But our disagreement ultimately is more fundamental. Even if we were persuaded that a study or set of studies could establish arbitrariness in the administration of the death penalty, we could not embrace a constitutional challenge based solely on such a showing. Our system of criminal justice relies extensively on the judgment of jurors. In the capital context, we have held that the Sixth Amendment jury-trial right extends to any factual finding upon which death eligibility rests, *Ring v. Arizona*, 536 U.S. 584 (2002), and most states have chosen to confer upon capital jurors the ultimate moral decision between life or death. In addition, we have held that the Eighth Amendment mandates a broad right of capital defendants to put before the sentencer any relevant aspect of their character, background, or circumstances of the offense. *Woodson v. North Carolina*, 428 U.S. 280 (1976). States must also provide a vehicle by which sentencers are empowered to respond to such evidence with a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586 (1978); *Penry v. Lynaugh*, 492 U.S. 302 (1989).

Given the constitutionally mandated discretion inherent in our capital punishment system, we must accept the possibility that jurors in some cases might exercise their discretion in an arbitrary or even an unprincipled manner. Such abuse is, and has been, one potential cost of our jury system, and a cost that we cannot wholly eliminate without doing violence to our enduring constitutional commitment to the right of trial by jury. This conclusion is firmly rooted in precedent. In *McCleskey v. Kemp*, 481 U.S. 279 (1987), we likewise were confronted with a statistical study purporting to demonstrate the illegitimate influence of race—particularly the race of the victim—in capital decision-making. We accepted, for the purposes of our decision, the study's assertion that race might have played some role in the administration of Georgia's post-*Furman* statute. We

nonetheless rejected both the Eighth and Fourteenth Amendment challenges to McCleskey's sentence. Without proof that the jury in McCleskey's case acted with racial bias, we were unwilling to find a violation of the Constitution's equal protection guarantee. Nor were we prepared to conclude that an otherwise constitutional punishment becomes "cruel and unusual" simply because its distribution does not satisfy some ideal standard of fairness. As we said then, the Eighth Amendment's prohibition of cruel and unusual punishments applies to both capital and non-capital sanctions, and a contrary holding would have called into question the sustainability of all criminal punishments.

B.

Petitioners also argue that the death penalty should be abolished because of the intolerable risk of executing factually innocent persons. Petitioners refer to several studies asserting the factual innocence of several persons who have been executed over the past two decades. In addition, petitioners cite a study purportedly documenting over three hundred cases of wrongful convictions in capital cases since *Furman*. Petitioners claim that this "new" and "unequivocal" evidence of error in capital cases justifies revisiting our decisions sustaining the death penalty as a permissible punishment.

We accept as fact that some recent executions in this country constituted grave miscarriages of justice because the offenders punished were not guilty of the crimes for which they were executed. We do not, however, regard such errors as fatally undermining the constitutional status of the death penalty. Virtually all socially beneficial activities in society carry with them a risk of collateral harm. The construction of bridges and skyscrapers, the exploration of space, and the inoculation against disease, for example, all carry with them some risk of accidental death. Of course, there is a special harm attached to punishment erroneously imposed by the state. The condemned not only suffers the direct physical consequences involved in the punishment but also bears the stigma of guilt at the very moment the punishment is exacted. Not only does the wrongly punished (and his or her loved ones) suffer injury; society itself experiences a terrible loss. Public confidence in the ultimate justice of our criminal system is undermined as well. For these reasons, the criminal justice system requires the state to satisfy a high standard of proof before imposing criminal sanctions. But determinations of guilt are nonetheless inevitably subject to the error surrounding all human enterprises.

Petitioners insist that the death penalty is different, because errors made cannot be corrected and because the death penalty—unlike incarceration—is not essential to a functioning criminal justice system. We agree that errors in capital cases are especially harmful and, if not discovered until after execution, incapable of correction. But this observation is no less true today than when the Constitution was adopted, or when the federal government and many states enacted their current death penalty statutes. The fallibility of human judgment is a common argument,

perhaps even a compelling one, against the death penalty as a matter of policy. But such an argument does not become constitutionally compelling simply because actual errors are documented. It would be hubris to presume that the recently lamented wrongful executions were the first or only examples of error in the history of American capital punishment. The Constitution cannot require perfection here any more than it can require perfection in any state practice. Moreover, the decision whether the death penalty is essential or inessential to criminal justice is unavoidably a matter of policy. As we said in *McCleskey*, we cannot insist on constitutional standards for the death penalty that place “totally unrealistic conditions on its use.” 481 U.S. at 319.

C.

Petitioners also argue that they face a constitutionally intolerable risk of prolonged incarceration on death row. They assert that the average time death-sentenced inmates spend on death row before consummation of sentence has increased substantially over the past two decades and that this phenomenon constitutes a form of wanton cruelty that inflicts unnecessary suffering.

The States argue, with some force, that the petitioners, presenting their claim on direct review, are not in a position to claim undue delays. Moreover, petitioners’ cases arise in jurisdictions that have not generally experienced extensive lapses between pronouncement of sentence and execution. Apart from these substantial procedural defects in their claims, though, we reject the notion that prolonged death-row incarceration carries with it a special sort of cruelty prohibited by the Eighth Amendment.

At the outset we note the obvious tension between the interest death-sentenced inmates have in extensive procedural safeguards and their concerns relating to prolonged incarceration on death row. To the extent lengthy direct appeals and state and federal post-conviction proceedings are necessary to guard against unconstitutional or fundamentally flawed convictions, such proceedings inevitably delay the execution of sentence. More fundamentally, though, we find little support for the proposition that delayed executions carry with them a cruelty distinct from, and more troublesome than, the alternative of accelerated executions. Part of the punishment of the death penalty is the experience of awaiting one’s own demise. Though we all face the certainty of death, there is a special pain attached to the fate when directed toward an otherwise healthy person unable to prevent or avoid its untimely infliction. This pain is perhaps the greatest part of the death penalty and likely dwarfs the actual suffering attendant to the execution itself.

Delays in the administration of the death penalty prolong the time during which a defendant must contemplate his or her own demise. Yet such delays also lengthen life itself, and, as history has demonstrated, the vast majority of death row inmates choose to challenge their sentences rather than forgo appeals (even appeals that carry only remote prospects for success). Given that most inmates would rather live with a sword hanging over their heads than acquiesce in their

punishment, we find it problematic to describe such delays as excessively or unconstitutionally cruel.

The petitioners' remaining arguments focus less on the cruelty such delays might inflict upon inmates and more on the significance of such delays from a broader perspective. According to petitioners, retributive and deterrent justifications for the death penalty cannot be credibly advanced for a punishment so remote and uncertain in its application. Petitioners also contend that extensive delays in the administration of the death penalty reflect an emerging wariness of the punishment that in turn reflects its incompatibility with contemporary morality. We agree with petitioners that these sorts of considerations are relevant to whether the death penalty remains consistent with evolving standards of decency and we will consider them in the course of resolving that claim, to which we now turn.

D.

We now must address petitioners' central claim, that the death penalty is no longer consistent with prevailing standards of decency. Our attention is directed to numerous developments purported to reflect a "sea-change" in public attitudes regarding the death penalty. Since we decided *Furman* fifty years ago, the number of states authorizing the death penalty has declined. At the time *Furman* was decided, 40 states had statutes permitting the imposition of capital punishment. When we revisited capital punishment four years later, 35 states had enacted new death penalty statutes. Upon New York's reintroduction of the death penalty almost two decades later in 1995, 38 states authorized capital punishment. Since that time, three states have abolished the death penalty legislatively (Nebraska (2005), New Hampshire (2009), and Washington (2015)) and two state courts have invalidated death penalty statutes under state constitutional provisions (New Jersey (2009) (state constitution requires abolition) and Illinois (2012) (invalidating death penalty statute because of arbitrariness concerns and insufficient safeguards against execution of innocents, but withholding judgment on the sustainability of the death penalty under different statutory scheme)). Accordingly, only 33 states currently provide for the death penalty.

In addition, the rate of executions has declined over the past decade (2012-22), with an average of 54 per year (compared to an average of 72 during the prior decade (2002-12)). Of these executions, 14 per year have been carried out at the federal level (compared to six per year in the preceding decade). On the basis of these numbers, petitioners in the state cases argue that support for the death penalty at the state level has decreased significantly (given the decline from an average of 66 per year to an average of 40 per year).

Petitioners also note that the execution rate (executions per homicide) is likewise significantly lower, given that the number of executions has declined at a time when the raw number of homicides has risen. The homicide rate itself has remained relatively constant, as the increase in homicides corresponds roughly to

the increase in population over that same period. Death-sentencing rates have also modestly declined over the past three decades.

Of even greater importance, according to petitioners, is the increasing failure or refusal of many death penalty jurisdictions to carry out death verdicts obtained at capital trials. Two years before *Furman* was decided, the nation's death-row population was 631. Three decades later, at the turn of the millennium, approximately 3,600 prisoners were on death row. Today, 6,200 prisoners remain on death row. The size of death row is in part a reflection of formal moratoria in place in four states (California (adopted in 2013), Maryland (adopted in 2010), North Carolina (adopted in 2016), and Ohio (adopted in 2009)), but it also reflects a decline in executions relative to death sentencing. During the preceding twenty years (2002-22), approximately 5,100 persons have been sentenced to death but only 1,278 have been executed (another 850 have died while incarcerated, as the average age of a death-sentenced inmate has increased dramatically). Petitioners insist that the concentration of executions in relatively few states (six states and the federal government have carried out over 1,100 of the 1,278 execution) suggests that the death penalty is in practice rejected by a large majority of jurisdictions and hence is inconsistent with the values of the Nation as a whole.

We agree with petitioners that these figures reflect a significant shift in public attitudes toward the death penalty. Public support for the death penalty cannot be fairly gauged by the raw number of states authorizing its use; nor is such support accurately reflected in the number of persons sentenced to death. Rather, popular support for the death penalty must be demonstrated by a willingness to carry out executions. There are, of course, numerous reasons that might account for a delay between sentence and execution. But the widespread failure of many death penalty jurisdictions to carry out death sentences suggests a critical lack of political will. The increasing gap between the size of death row on the one hand, and the number of executions on the other, reveals a dissonance that we cannot ignore.

In addition, we must acknowledge a shift in our own Eighth Amendment jurisprudence since we last addressed the constitutionality of the death penalty as a punishment in 1976. In the decisions of that year, we rejected the notion that the death penalty ran counter to public values based solely on the overwhelming legislative response to *Furman*. In subsequent proportionality decisions, which likewise are rooted in evolving standards of decency, we focused most prominently on "objective indicia" of public values, such as legislative statutes and actual juror behavior. See, e.g., *Stanford v. Kentucky*, 492 U.S. 361 (1989) (rejecting proportionality challenge to execution of juveniles); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (rejecting proportionality challenge to execution of persons with mental retardation). It is fair to say that this approach foreclosed the possibility that a practice authorized by a majority of jurisdictions and embraced by juries in their sentencing decisions would be deemed contrary to evolving standards of decency.

Over the past two decades, however, we have embraced a more nuanced approach to this critical Eighth Amendment inquiry. We have looked not simply at a "snapshot" of public attitudes, but carefully examined the direction and

momentum of change in societal views. *Atkins v. Virginia*, 536 U.S. 304 (2002), *N. v. Texas* (2009). Such an approach offers a dynamic portrait of public attitudes and helps distinguish between those statutes likely to represent public values and those that might instead reflect outmoded commitments. We have also looked outside of the political arena for indicia of public attitudes, such as the considered judgments of professional organizations with relevant expertise and the views of intermediate organizations, such as religious groups, which have developed and articulated positions concerning the appropriateness of criminal punishments. We have likewise examined world opinion, reflected not only in formal treaty commitments with foreign nations, but also in the practices and moral commitments of other societies. These various sources of public opinion provide important insights regarding the evolving moral commitments of the American community.

This refined methodology led us to conclude that the Eighth Amendment forbids both the execution of persons with mental retardation, *Atkins*, and the execution of juveniles, *N. v. Texas*. It is important to note that we reached these conclusions notwithstanding the fact that a majority of death-penalty states authorized such executions, and that juries had demonstrated an apparent willingness to sentence such offenders to death. Implicit in our decisions was our view, which we affirm today, that evolving standards of decency are measured not solely by the “law on the books” or the behavior of certain juries, but by a more global examination of social practices and commitments.

All of the factors identified in our emerging Eighth Amendment approach lend support to the conclusion that the death penalty for ordinary crimes has become inconsistent with evolving standards of decency. In this country, the direction of political reform over the past two decades has been uniformly toward restriction and abolition. None of the thirteen jurisdictions prohibiting use of the death penalty as of 2002 (twelve states and the District of Columbia) have sought to reintroduce that punishment. At the same time, five states that had authorized the death penalty as of 2002 have withdrawn such support, and four others have formally prohibited executions to be carried out until some future time. And, as we have documented above, many other states have shown considerable reluctance to carry out executions allowed by law.

Professional, religious, and world opinion also points toward the declining moral status of the death penalty. The American Bar Association has adopted a formal resolution calling for the abolition of the death penalty (2009), having previously called for a moratorium on executions (1997). The ABA’s report supporting its resolution criticizes numerous aspects of the American death penalty system, including the inadequacy of representation, the influence of arbitrary and invidious factors in capital sentencing, and the inadequacy of safeguards to prevent wrongful executions. The ABA report particularly emphasizes the unusual burdens capital cases place on our justice system and concludes that the overall costs of capital punishment—both financial and institutional—cannot be justified

in light of the death penalty's relatively limited role in and value to the American system of criminal justice.

Prominent legal academics, criminologists, and sociologists have filed a brief calling for the constitutional abolition of the death penalty. They argue, much like the ABA, that the death penalty system in this country is critically flawed. Included in their submission are studies concerning the limited deterrent value of the death penalty, as well as information purporting to document hundreds of wrongful convictions and executions over the past 50 years. Given national and international trends, the academics' brief insists that the appropriate question is not whether but when the United States will firmly and finally abolish the death penalty as an appropriate form of criminal punishment.

We also have several submissions from a variety of religious organizations criticizing the continued use of the death penalty. The briefs, representing diverse and wide-ranging sects, assert from an ecumenical perspective that retention of the death penalty causes significant harm in contemporary American society. The brief submitted on behalf of the National Jewish and Catholic Task Force claims that "the death penalty reduces rather than enhances respect for human life and undermines the near-universal recognition of mercy and the possibility of redemption as worthy if not indispensable aspirations in the administration of criminal justice."

The European Union (EU) has submitted an amicus brief lamenting the United States' continued retention of capital punishment. The EU documents the move toward abolition in virtually all countries that share the United States' commitment to basic human liberties and democratic values. The EU calls for this Court to "reconcile the obvious tension between the United States' espousal of fundamental rights and its blatant disregard of such in its use of the death penalty." The EU brief, along with another submission by a coalition of international attorneys, also insists that the United States' position on the death penalty significantly undermines the United States capacity to exert moral and political influence in the conduct of its foreign policy. A brief filed on behalf of various domestic businesses similarly insists that the death penalty should be abolished because "the present course causes serious financial harm to American business interests because of increasing foreign boycott of American investment and trade solely because of the United States' retentionist stance."

Our reading of contemporary practice, professional, religious, and world opinion persuades us that a consensus has emerged rejecting the death penalty for ordinary crimes in the United States. The current execution rates for ordinary crimes, together with the notable decline in jurisdictions authorizing executions, suggest a significant departure from our country's prior enthusiastic embrace of the death penalty. The various positions articulated on behalf of a wide range of interested professional, religious, and international constituencies offer some insight as to the concerns animating this noticeable shift. We do not believe that every jurisdiction in this country must renounce the death penalty before we can

fairly acknowledge the emergence of a new national consensus forbidding the death penalty's use in ordinary criminal cases.

That being resolved, we cannot justify extending our holding to capital prosecutions based on terrorism, political assassination, or other "extraordinary" crimes. Execution rates—the very data on which we rely in part to document the growing rejection of the death penalty for ordinary crime at the state level—reveal an increased interest and willingness to punish extraordinary crime with death. In the three decades following *Furman* (1972-2002), only one offender was executed for acts of terrorism. Since that time, the federal government has sought and secured numerous capital convictions for crimes involving terrorism or conspiracy to commit terrorism. Close to two hundred executions for such crimes have been carried out for such offenses over the past two decades and we see no sign that responsible public officials or the public at large regard such punishment as excessive or unwarranted.

Our task, though, is not simply to identify prevailing views. We must also bring our own judgment to bear on the status of the death penalty in American life. We are persuaded that the line we draw today—preserving the death penalty for extraordinary crimes while abolishing it for ordinary crimes—is consistent with the overarching goals of capital punishment. The central justification for the death penalty in the modern era has been retribution. Much of our death penalty jurisprudence in the first few decades of the post-*Furman* era sought to require states to identify the "worst" offenders and offenses. Since that time, our society has come to recognize through painful experience that ordinary murders traditionally punished at the state level are different in kind from the kinds of threats we have faced at the national level. The menace of terrorism stands alone as a threat warranting imposition of the most severe punishment. The consensus we identify today thus carries forward the logic of our earliest death penalty jurisprudence and applies it through the prism of new and importantly different national circumstances.

We recognize that the line dividing "ordinary" and "extraordinary" crimes might be difficult to discern in some cases and we do not today endeavor to enumerate those crimes for which the death penalty may be lawfully imposed. We are satisfied that the federal petitioner's conviction for conspiracy to possess and utilize a weapon of mass destruction falls on the "extraordinary" offense side of the line.

Accordingly, we reverse the judgment of the courts in the state cases and remand for resentencing and affirm the judgment of the United States Court of Appeals for the Second Circuit.

JUSTICE Repondez, with whom JUSTICE Burke and JUSTICE Thomas join, dissenting.

I join fully the majority's opinion insofar as it upholds the power of the politically accountable branches of government to authorize punishment for acts of

terrorism (and, presumably, other non-“ordinary” crimes such as treason and military offenses during wartime) with the ultimate sanction of death.

I also join the majority in rejecting petitioners’ claims based on the purported arbitrary and discriminatory application of the death penalty, the risk of error in the application of the death penalty, and the length of time some convicted capital murderers spend on “death row” awaiting execution. As for the first claim, I agree with the majority that petitioners construe our precedents incorrectly when they insist that existing patterns of capital sentencing outcomes within individual states or across the country, either on their face or after complex statistical analysis, are sufficient to demonstrate that existing capital procedures are necessarily infected with the kind of irrationality or intentional discrimination that would require their constitutional invalidation.

As for the second claim, I agree with the majority that petitioners utterly fail to persuade when they insist that the inevitable fallibility of human judgment presents a constitutional impediment to the use of capital punishment. Tragic as errors undoubtedly are in capital cases, they present no issue different from the unavoidable risk to innocent human life posed by many other kinds of human endeavor and thus offer no special constitutional ground upon which foes of capital punishment can stand.

As for the third claim, I agree with the majority that the constitutional proscription of cruel and unusual punishment is not implicated by the amount of time that may pass while convicted capital defendants pursue various direct and collateral challenges to their convictions or death sentences. While exceedingly long delays between capital verdicts and executions are troubling, as much for penological reasons as for the suffering of capital defendants in situations of uncertainty argued by petitioners, such delays do not call for the constitutional abolition of capital punishment under the Eighth Amendment, given the incentives that exist for capital defendants to welcome and, indeed, to collude in them.

I part company with the majority, however, in its conclusion that neither the states nor the federal government may constitutionally impose capital punishment for so-called “ordinary” crimes. The majority claims to be applying the Eighth Amendment jurisprudence that we have refined for the past 50 years, but its application is nothing short of an abdication. The Eighth Amendment’s proscription of “cruel and unusual” punishments is not a roving mandate for shifting majorities of this Court to cast aside for all time—or until the majority shifts again—punishments of which they personally disapprove on political, moral, or religious grounds. For considerably more than 50 years, we have consistently maintained that our duty in applying the Eighth Amendment is to prohibit the more politically accountable branches of government from applying only those punishments that are inconsistent with the “evolving standards of decency that mark the progress of a maturing society,” *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion), and that this analysis is to be governed “by *objective* factors to the maximum possible extent” and “should not be, or appear to be, merely the subjective views of individual Justices . . .” *Coker v. Georgia*, 433 U.S. 584, 592

(1977) (plurality opinion) (emphasis added). In light of the solid, wide-spread, and long-standing support for the practice of capital punishment evidenced by the actions of state legislatures and sentencing juries, and confirmed by public opinion, the majority's decision to ban that practice across the country in all cases of "ordinary" first-degree murder is utterly without constitutional foundation and thus beyond any legitimate power of this Court.

The majority attempts to ground its ban in what it describes as a "shift" in our Eighth Amendment jurisprudence as reflected in our decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the execution of persons with mental retardation violates the Eighth Amendment), and *N. v. Texas* (2009) (holding that the execution of juveniles under the age of 18 violates the Eighth Amendment). While it is true that the application of our Eighth Amendment doctrine in those cases was debated and debatable, see dissenting opinions of Rehnquist, C.J., and Scalia, J., in *Atkins*, and dissenting opinions of Thomas, J., and Scalia, J., in *N.*, we have never purported, in those or any other cases, to abandon the basic structure of our constitutional analysis. We have always asked essentially two questions in applying our "evolving standards of decency" understanding of the Eighth Amendment's proscription of cruel and unusual punishment: whether we can discern a societal "consensus," *Atkins*, 536 U.S. at 312–13, and whether "there is reason to disagree with the judgment reached by the citizenry and its legislators." *Id.* at 313. In this case, the majority purports to find a societal consensus against the imposition of the death penalty for "ordinary" first-degree murder, and then it approves that purported consensus by bringing to bear its own "judgment." Neither conclusion is a faithful or even plausible application of our Eighth Amendment precedents.

On the issue of consensus, we have always insisted that the "clearest and most reliable objective evidence of contemporary values" is the legislation enacted by the country's legislatures. *Atkins*, 536 U.S. at 322–23 (citing *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)). In our earliest precedents applying the consensus test of our "evolving standards of decency" standard, there were very strong indications of true consensus. In *Coker*, for example, Georgia was the *only* state then authorizing the death penalty for the crime of rape of an adult woman. 433 U.S. at 594. But even in our most recent and least demanding applications of the consensus test, we still have had vastly stronger evidence of legislative consensus than in the case before us today. In *Atkins*, 30 of 50 of the states precluded the execution of mentally retarded defendants, either because they failed to authorize the death penalty in any case (12 states) or because they legislatively exempted those with mental retardation from the application of their existing death penalty statutes (another 18 states). 536 U.S. at 314–15. In *N. v. Texas*, 29 of 50 states precluded the execution of defendants who were under the age of 18 at the time of their offenses, either once again because they failed to authorize the death penalty in any case (13 states) or because they legislatively exempted juveniles from the application of their capital statutes (16 states). In the instant case, a full 33 states continue to endorse legislatively the imposition of capital punishment for varying

definitions of “ordinary” capital or aggravated murder—more states than we have required to find an actual consensus *against* certain death penalty practices and certainly enough, one would think, to preclude us from discerning a consensus in the other direction!

The majority’s attempt to conjure a consensus is similarly unconvincing when the other most reliable form of objective evidence—actual jury verdicts—is considered. We have repeatedly recognized that the actions of sentencing juries, though less compelling than legislative judgments, “is a significant and reliable index of contemporary values.” *Coker*, 433 U.S. at 596 (quoting *Gregg v. Georgia*, 428 U.S. 153, 181 (1976)). As the majority opinion notes, death sentencing rates have declined only slightly in the past two decades, and in fact, there are approximately 6,200 inmates currently on death row, 5,100 of whom were sentenced to death, overwhelmingly by juries, within the last two decades. In response to these unassailable facts, the majority seeks to rely on the admittedly greater decline in the nation-wide execution rate. As the majority correctly notes, “numerous reasons . . . might account for a delay between sentence and execution,” but the majority immediately proceeds to assume, without any objective proof whatsoever, that the growing backlog on death row is due to growing societal reluctance to execute. In fact, there are many alternative explanations for the recent (modest) decline in the execution rate. First, several states have adopted moratoria on executions with the express purpose of studying and crafting appropriate remedies for any deficiencies in their capital practices. Such a moratorium cannot fairly be described as a “refusal” by a death penalty jurisdiction to carry out executions for all time. Moreover, the excessively long periods that some capital inmates are spending on death row are also in substantial part due to the efforts of capital defendants themselves (through their attorneys), who often affirmatively welcome the delays that such litigation can generate. Once again, these delays cannot fairly be chalked up to the reluctance of state actors to carry out death sentences. Finally, such delays are often the unavoidable by-product of some of our Eighth Amendment decisions—like *Atkins*—which provided much new fodder for extensive and time-consuming litigation by capital defendants.

Even if we grant the majority its unproven assumption—that at least some of the delays between sentencing and execution are due to actual reluctance or unwillingness on the part of some state actors, like judges or governors, to resolve cases or set execution dates—little follows from it. The attitudes of state actors like judges or governors toward carrying out executions should be accorded much less weight in our constitutional analysis than the considered judgment of sentencing juries, given the jury’s intimate involvement in an individual case and its function of “maintain[ing] a link between contemporary community values and the penal system.” *Gregg*, 428 U.S. at 181 (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968)). And not only are juries clearly willing to sentence substantial numbers of capital defendants to death, the other state actors involved in capital proceedings are also clearly willing to carry out a significant number of

executions. Even with the delays and the concomitant decline in the execution rate identified by the majority, we still have been executing an average of 54 capital defendants a year nation-wide over the past decade—more than one a week! This can hardly be deemed “truly unusual” as we were able to deem the execution of mentally retarded defendants, *Atkins*, 536 U.S. at 316 (five such defendants executed in the preceding 13 years), or the execution of juveniles, *N.*, (29 juveniles executed in the preceding 30 years).

Finally, in both *Atkins* and *N.*, we also looked to public opinion polls to gauge societal attitudes. Such polls are admittedly less objective sources from which to draw inferences about societal attitudes, given how “methodological and other errors can affect the reliability and validity of estimates about the opinions and attitudes of a population derived from various sampling techniques.” *Atkins*, 536 U.S. at 326 (Rehnquist, C.J., dissenting) (citing sources). But polling data, however questionable, in our prior cases strongly supported the exemption of mentally retarded and juvenile offenders from the ambit of the death penalty, whereas in the instant case, polling data shows that a solid majority has supported capital punishment in the abstract for the past 50 years. See Gallup Polling Data from 1972 to 2022 on answers to the question: “Do you favor the death penalty for those convicted of murder?”

The only sources cited by the majority that fairly *do* suggest real and deep opposition to the death penalty are the opinions of various professional and religious groups and opinions and practices of some other countries, primarily those of Western Europe. It is true that in both *Atkins* and *N.*, we bolstered our conclusion that a societal consensus existed by passing reference to these sources, but we never suggested that these sources *alone* could create a consensus when objective sources failed to demonstrate one. We should decline to do so here.

The majority’s application of the second prong of our Eighth Amendment analysis is as unconvincing as its application of the first prong. Not only has the majority failed to find anything resembling a consensus in favor of abolishing the death penalty for “ordinary” murders, it has failed to give any good reason why, bringing our own considered judgment to bear, there *ought* to be such a consensus. As the majority correctly recognizes, there is clearly no current consensus against the use of capital punishment in cases of terrorism or other “extraordinary” crimes, given the steep rise over the past few decades in such executions at the federal level. While it is true that some “ordinary” murders that are technically eligible for capital punishment do not represent the same degree of callousness or generate the same degree of harm or fear as “extraordinary” crimes, surely it is not the case that all “ordinary” murders belong in an entirely different category. One need only think of mass murderers like John Wayne Gacy, Ted Bundy, or John Allen Mohammed and John Lee Malvo (the D.C. “snipers”) to realize that cruelty, suffering, and terror are not the special province of terrorists. Indeed, the decline in the rate of death sentences and the larger decline in the rate of actual executions may reflect exactly this realization—that few, but still clearly some, “ordinary” murders deserve the ultimate sanction. The goals of capital punishment, which

include not only retribution, but also permanent incapacitation and general deterrence, are all served by the imposition of capital sentences in such heinous cases. There is no plausible ground, either in our Constitution nor in our truly considered judgment, to categorically rule otherwise.

The majority purports to acknowledge that “our job . . . is to assess the constitutional status of the death penalty and not to arrive at our own judgment of its wisdom or morality.” While this is clearly the correct formulation of the task before us, the majority turns its back on our necessary, deeply important, but unglamorous role in the constitutional order. Instead, it attempts to discern the direction of history so as to be on the side of the conquering heroes when the history books are written 50 or 100 years from now. The majority may well be right that American history ultimately will turn its back on the death penalty, but that is neither here nor there. Our history long ago turned its back on the usurpation of political authority by the few and unelected. The majority should not read the Eighth Amendment to give it the authority to override the considered and reasonable choice of the majority of American jurisdictions on so important an issue.

EPILOGUE

We do not offer the foregoing as a hard prediction or even a conditional prediction about the constitutional abolition of capital punishment (for ordinary crimes) twenty years from now. We are not confident that judicial abolition will occur in our lifetimes, or ever, for that matter. Nor are we confident that if it occurs, it will occur in just the way we describe. Rather, we mean to illustrate in a dramatic way that such abolition is more possible now, both jurisprudentially and politically, than it has been at any time since *Furman* itself.

We also mean to suggest that the route to nation-wide abolition in the United States is almost certainly through constitutional litigation in the courts rather than through state-by-state legislative abolition. To the extent that there is “American exceptionalism” regarding capital punishment, it lies in the much greater resistance to abolition through the political branches of government than has been experienced in the rest of the Western industrialized world, where abolition was largely accomplished legislatively.¹ American federalism, which divides up authority for criminal justice generally and capital punishment in particular, into more than 50 jurisdictions makes nation-wide abolition unlikely on its face, especially when one considers the sharp regionalization of the use of the death penalty within the United States.² Moreover, the American tradition of both political populism generally and criminal justice populism in particular make

¹ See generally Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97 (2002).

² See *id.* at 121–26 (considering “federalism” and “Southern exceptionalism” as explanations for American exceptionalism regarding the retention of capital punishment).

abolition more difficult on the level of individual jurisdictions.³ This is not to say that political movements for abolition are pointless or will have no effect on the fate of capital punishment in the United States. Rather, our hypothetical Supreme Court decision is meant to show how even modest and partial political movements for abolition and/or moratorium connect to the Supreme Court's "evolving standards of decency" interpretation of the Eighth Amendment.

We also suggest through our hypothetical opinion that the Court's new understanding of its "evolving standards of decency" in *Atkins* makes that particular constitutional theory the most promising of the possible theories available for constitutional abolition. We expose some of the weaknesses and relative disadvantages that other theories—such as those based on arbitrariness and discrimination, those based on the risk of executing the innocent, and those based on the cruelty of the so-called "death-row phenomenon"—currently exhibit. We do not mean to suggest that these theories are unconvincing to us or so improbable that they should be abandoned by litigators or the courts; rather, we simply are hazarding a guess about which of possible, plausible constitutional theories is the most likely route to judicial abolition. The approach accepted by a majority of the Court in *Atkins*—especially its emphasis on the direction and speed of change rather than absolute numbers in discerning societal "consensus" and its willingness to consider international opinion and practice—suggests to us a new route to abolition that we would not have predicted before the opinion itself. It is that route that our hypothetical opinion seeks to sketch.

We are bolstered in our belief that this path might be taken sometime in the foreseeable future by two sets of observations—one judicial, and one political. On the judicial side, there are already four Justices of the Court clearly committed to applying the *Atkins* rationale to exempt juvenile offenders (under the age of 18 at the time of their crimes) from the ambit of the death penalty,⁴ even though this case is currently less strong than *Atkins* was in the number and speed of state legislative movement.⁵ Moreover, one of those Justices—Justice Breyer—has indicated in writing serious concerns both about the administration of the death penalty in the United States and about the degree to which local communities are in fact committed to the use of the death penalty. Justice Breyer concurred in the Court's decision in *Ring v. Arizona*,⁶ decided four days after *Atkins*, which held that juries rather than judges must make any factual determinations necessary for the defendant to be eligible for a death sentence. Justice Breyer would have gone further and required that juries rather than judges do the actual sentencing in all capital cases. His reasoning included an astounding, and thus far little noticed,

³ See *id.* at 114–22 (considering "populism" and "criminal justice populism" as explanations for American exceptionalism regarding the retention of capital punishment).

⁴ *In re Kevin Nigel Stanford*, 537 U.S. 968 (2002) (Stevens, J., joined by Souter, Ginsberg, and Breyer, JJ., dissenting from denial of a writ of habeas corpus).

⁵ *Atkins v. Virginia*, 536 U.S. 304, 316 n.18 (2002).

⁶ 536 U.S. 584 (2002).

catalogue of deficiencies in the administration of capital punishment in the United States and a recognition that only a small number of the nation's counties are responsible for most of its death sentences. These twin observations led Justice Breyer to conclude that procedures were necessary to "help assure that, in a particular case, the community indeed believes application of the death penalty is appropriate, not 'cruel,' 'unusual,' or otherwise unwarranted."⁷

These indications from the Supreme Court that the *Atkins* methodology might someday lead to more sweeping abolition are bolstered by the willingness of some lower federal court judges to embrace sweeping challenges to capital punishment. Two federal judges recently struck down the federal death penalty—one using a risk of error analysis that we reject in our hypothetical opinion,⁸ and one applying *Ring* to conclude that the federal death penalty statute was unconstitutional because it provided constitutionally inadequate evidentiary rules at capital sentencing proceedings.⁹ These two decisions on the heels of *Atkins* and *Ring* suggest that there is growing willingness, at least in some pockets of the federal judiciary, to be receptive to broad challenges to the administration of death penalty in the United States.

On the political side, there is a possibility that the death penalty may cease to maintain its hold as the ultimate symbol of "tough on crime" public policy, both for politicians and for ordinary citizens. As this time, the nation faces—and it will likely to continue to face for some time—significant threats to the safety and security of its citizens from international terrorism, both abroad and on American soil. In such times, many "ordinary" murders, brutal and senseless though they may be, might pale in comparison with threats posed and the harms actually inflicted by terrorists. Willie's Horton's face, so powerfully used in the late 1980s as the symbol of what was wrong with American crime policy, might well be replaced with that of Osama bin Laden in the popular imagination. Thus, insistence on the death penalty for "ordinary" murders may seem less compelling and necessary to citizens as a symbolic representation of safety from their deepest fears.

Moreover, politicians, especially leaders at the national level, may come to appreciate that America's stance on the death penalty may impair the willingness of our Western allies to cooperate with us fully in international law enforcement, and thus politicians might be willing to trade some victories in fighting the war on "ordinary" crime for greater power in fighting the war on terrorism. Of course, if we maintain the death penalty, as our hypothetical opinion does, for terrorism, this may still cost us some cooperation from our allies. But a significant move by the United States away from capital punishment will likely win us substantial good will abroad. Moreover, the experience of most European countries with abolition

⁷ *Id.* at 618 (Breyer, J., concurring in the judgment).

⁸ *United States v. Quinones*, 205 F. Supp. 2d 256 (S.D.N.Y. 2002), *rev'd* *United States v. Quinones*, 313 F.3d 49 (2d Cir. 2002).

⁹ *United States v. Fell*, 217 F. Supp. 2d 469 (D. Vt. 2002).

of the death penalty has followed the same pattern that we hypothesize here: abolition for “ordinary” crimes first, followed by complete abolition after an interval. Thus, the incentives for law enforcement officials of either political party to trade the domestic death penalty for good will from our allies in the war on terrorism may lead Republican national leaders to insist less vociferously that prospective federal judicial nominees pass a litmus test of “tough on the death penalty” as a prerequisite to appointment or confirmation than in the past.¹⁰ Political shifts along these lines, even to a degree, would clearly help make the hypothetical opinion we have drafted more of a plausible reality.

Shelley the great Romantic poet claimed, “The great instrument of moral good is the imagination.”¹¹ Given our total lack of capacity to promote moral good through poetry, we have chosen to use our imaginations to consider one possible path to abolition of the death penalty, at least for most crimes, in the United States. Like any work of the imagination, ours is subject both to challenges as to its relevance to the world of reality and to challenges from competing imaginings. We welcome and, indeed, hope to stimulate both sorts of challenges.

¹⁰ See, e.g., Neal A. Lewis, *GOP to Challenge Judicial Nominees Who Oppose Death Penalty*, N.Y. TIMES, Oct. 15, 1993, at A26.

¹¹ PERCY SHELLEY, A DEFENCE OF POETRY (1821).

